

COMSTOCK TUNNEL & DRAINAGE CO.
SUTRO TUNNEL CO.

IBLA 83-856

Decided March 1, 1984

Appeal from decisions of the Nevada State Office, Bureau of Land Management, declaring lode mining claims null and void ab initio in whole or in part. NMC 3624 through NMC 3628.

Reversed in part; set aside and remanded in part.

1. Mining Claims: Tunnel Sites -- Mining Claims: Withdrawn Land

The Act of July 25, 1866, 14 Stat. 242, which granted a right-of-way for construction of a tunnel and a right to purchase lodes within 2,000 feet from each side of the tunnel discovered by constructing the tunnel, did not segregate the surface of the land from mineral location. A Bureau of Land Management decision declaring a lode mining claim located within 2,000 feet of the tunnel right-of-way null and void ab initio will be reversed.

2. Mining Claims: Generally -- Mining Claims: Lands Subject to -- Mining Claims: Withdrawn Land -- Withdrawals and Reservations: Effect of

Where a lode mining claim is located partially on patented or withdrawn land, such a claim is not null and void ab initio to the extent of its inclusion of such lands. While the claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of such a claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry.

APPEARANCES: James B. Schryver, President, Comstock Tunnel & Drainage Company and Sutro Tunnel Company, Carson City, Nevada.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Comstock Tunnel & Drainage Company and Sutro Tunnel Company have appealed from two July 18, 1983, decisions of the Nevada State Office, Bureau of Land Management (BLM), declaring a total of five unpatented lode mining

claims null and void ab initio in whole or in part. One decision declared the HOM #8 and HOM #10 through #12 claims (NMC 3624 and NMC 3626 through NMC 3628) null and void ab initio in part. The decision stated, "that portion of your claim(s) within the following described lands is located on private land which is not subject to mineral location: T. 17 N. R. 21 E. MD Mer. Sec. 33, those lands within 2004 feet of the center line of the Sutro Tunnel." The decision stated that the portions of the claims on public lands were properly recorded.

The second decision declared the HOM #9 (NMC 3625) null and void ab initio because the claim lies within "2,004" feet of the center line of the Sutro tunnel and that BLM records show that such lands were segregated from mineral location and entry on July 25, 1866, by Act of Congress, 14 Stat. 242, granting a right-of-way for the Sutro tunnel. ^{1/}

On appeal appellant states that it owns the Sutro tunnel and the rights conveyed to Adolph Sutro by the Act of Congress. It asserts that it is the successor and assign of Adolph Sutro. It further states that it "has been under the impression that the mineral rights within the boundaries of the Sutro Tunnel Land Grant were in fact reserved for location purposes to this company, excepting only prior patented claims and claims on the Comstock Lode itself."

[1] We will first examine the BLM decision concerning the HOM #9. In a recent Board decision, Intermountain Exploration Co., 76 IBLA 349 (1983), we addressed the question of whether the surface of land within the Sutro tunnel grant was open to location. In Intermountain BLM had declared Intermountain Exploration Company's mining claim null and void ab initio because it was located within the Sutro tunnel grant. After analyzing the Sutro grant and subsequent mining legislation, the Board concluded at page 351 that "Congress had no intention of setting aside the surface within 2,000 feet of the line of the Sutro tunnel for the exclusive use of Sutro, but only to grant him rights to lodes of a specific length." The Board went on to state at page 352 that Intermountain Exploration Company's claim would be "subject to Sutro's prior rights to those veins and lodes cut, discovered or developed by running and cutting the Sutro tunnel, not null and void ab initio as found by BLM." The Board reversed the BLM decision.

The Intermountain rationale is controlling as to the HOM #9 claim. Thus, BLM improperly declared the HOM #9 claim null and void ab initio. That claim, rather than being null and void ab initio, would merely be subject to Sutro's prior rights. In this case appellant asserts, however, that it is the owner of the Sutro tunnel and the successor to Sutro's rights. If appellant's assertion is true, the rights acquired by location and Sutro's prior rights are merged in one party.

BLM's decision relating to the other four claims declared portions of those claims located on private land to be null and void ab initio. BLM did

^{1/} Section 2 of the Act granted the right to purchase veins and lodes "within two thousand feet on each side of said tunnel." We presume the discrepancy between BLM's reference to 2,004 feet and the statutory figure of 2,000 feet is explained by a difference in the starting point for measurement. BLM refers to 2,004 feet from the center line of the tunnel, while the statute speaks of 2,000 feet from each side of the tunnel.

not specifically describe those lands, but stated generally that they were within the Sutro tunnel right-of-way. It stated that those portions of the claims on public land were properly recorded. Appellant did not delineate its objections to this decision, except to state that it is the owner of the Sutro tunnel.

[2] Mining claims may only be located on lands open to the operation of the general mining law. 30 U.S.C. § 22 (1976); Floyd E. Benton, 62 IBLA 243 (1982). A lode mining claim located entirely on land previously patented without reservation of the minerals to the United States is null and void ab initio. Jonathan Carr, 49 IBLA 17 (1980). A lode mining claim located in part on such patented land or on land withdrawn from mineral entry, but based on a discovery on unappropriated land, is not null and void ab initio as to the patented or withdrawn land. While such a claim may not afford the claimant any rights whatever in the lands into which the claim is partially projected, the configuration of the claim might, in the proper circumstances, invest the claimant with extralateral rights in other land beyond or adjacent to that land which is closed to mineral entry. Santa Fe Mining, Inc., 79 IBLA 48 (1984). 2/ In Santa Fe Mining Inc., supra at 52, the Board stated the validity of those portions of lode claims which lie partly on patented or withdrawn land on the sole basis of a notice of location filed for record pursuant to 43 U.S.C. § 1744 (1976)." (Emphasis in original.)

In this case there is no evidence of where the discovery points are on the HOM #8 and HOM #10 through #12 claims in order to allow a determination that the discoveries are on lands open to location.

BLM's action in declaring portions of the four claims null and void ab initio was premature. For that reason, we will set aside that decision and remand the case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision relating to the HOM #9 is reversed and the decision concerning the HOM #8 and HOM #10 through #12 is set aside and remanded.

Bruce R. Harris
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Will A. Irwin
Administrative Judge

2/ A partial lode location of land patented without a reservation of minerals or of land withdrawn from mineral entry does not invest the claimant with any rights to the surface of those lands, but the question whether any mineral rights to the subsurface have been acquired should be determined on a case by case basis. Santa Fe Mining, Inc., supra at 52.

